FILE COPY

FILED
FEB 12 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 704

T. LAMAR CAUDLE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN J. HOOKER
1106 Nashville Trust Bldg.
Nashville 3, Tennessee

EUGENE GRESSMAN
1701 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

Of Counsel:

T. L. CAUDLE, JR.
Hilton Head Island, S. C.

C. ARTHUR ANDERSON
722 Chestnut Street
St. Louis, Missouri

WALTER M. HAYNES
Winchester, Tennessee

February 12, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Citation to opinions below	2
Jurisdiction	2
Questions presented	2
Rule involved	3
Statement of the case	3
Reasons for granting the writ	13
1. The direct conflict with the Griffin case	14
2. The conflicts involved in the "probable acquittal" rule	18
3. The District Court's abuse of discretion	22
Conclusion	29

CITATIONS

CASES:

Allison v. United States, 160 U.S. 203	25
Amos v. United States, 249 F. 2d 44 (App. D.C.)	24
Apel v. United States, 247 F. 2d 277 (C.A. 8)	20, 21
Baker v. State, 111 Ga. 141	19
Berry v. State, 10 Ga. 511	19, 20
Commonwealth v. Flanagan, 7 Watts & Serg. 415	19
Commonwealth v. Williams, 2 Ashmead 69	19, 20
Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212	28
Connelly v. United States, 249 F. 2d 576 (C.A. 8)	4, 24
Evans v. United States, 122 F. 2d 461 (C.A. 10)	18
Gordon v. United States, 178 F. 2d 896 (C.A. 6)	21
Griffin v. United States, 336 U.S. 704	13, 15, 16, 17, 18, 20, 21, 22, 26, 29
Griffin v. United States, 183 F. 2d 990 (App. D.C.)	15
Heald v. United States, 175 F. 2d 878 (C.A. 10)	20
Hicks v. United States, 150 U.S. 442	25
Johnson v. Commonwealth, 188 Ky. 391	25
Johnson v. United States, 32 F. 2d 127 (C.A. 8)	14, 18
Larrison v. United States, 24 F. 2d 82 (C.A. 7)	21

Page

Lessee of Ludlow's Heirs v. Park, 4 Hamm. (Ohio Rep.) 5 19
Mesarosh v. United States, 352 U.S. 1 ..... 15, 21, 27
Moore v. Philadelphia Bank, 5 Serg. & Rawles 41 19
Moore v. United States, 150 U.S. 57 28
Nilva v. United States, 212 F. 2d 113 (C.A. 8) 20
Quercia v. United States, 289 U.S. 466 25
Rainey v. State, 53 Ind. 278 ..... 19, 20
Reagan v. United States, 157 U.S. 301 25
Robins v. Fowler, 2 Ark. 133 19
Sahlinger v. People, 102 Ill. 241 19
State v. Diskin, 35 La. App. 46 19
State v. Hendrix, 45 La. App. 500 19
Thompson v. United States, 188 F. 2d 652 (App. D.C.) 24
United States v. Johnson, 327 U.S. 106 ..... 14, 19, 21, 22, 27, 28
United States v. Marachowsky, 213 F. 2d 235 (C.A. 7) 21
United States v. Murphy, 16 Pet. (41 U.S.) 203 26
United States v. On Lee, 201 F. 2d 722 (C.A. 2) 17, 18
United States v. Reina, 242 F. 2d 302 (C.A. 2) 26
United States v. Rutkin, 208 F. 2d 647 (C.A. 3) 18
United States v. Shotwell Mfg. Co., 355 U.S. 233 17
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 22
Williams v. United States, 137 U.S. 113 14
Winer v. United States, 228 F. 2d 944 (C.A. 6) 21
Wolcher v. United States, 76 S. Ct. 254, 100 L. Ed. 1521 17
Wolcher v. United States, 233 F. 2d 748 (C.A. 9) 18, 28

STATUTES AND RULES:

Rule 33, Fed. Rules of Crim. Proc. 3, 13, 17
Rule 25, Fed. Rules of Crim. Proc. 8
26 U.S.C.A. § 7122 5
1939 Internal Revenue Code, § 3761 5

MISCELLANEOUS:

Note, 39 Minn. L. Rev. 316 (1955) 21
Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293 (1957) 21
12 Cyc. 734 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

T. LAMAR CAUDLE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner T. Lamar Caudle prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 9, 1959. A separate petition for a writ of certiorari is being filed simultaneously herewith by Matthew J. Connelly, who was petitioner's co-defendant and co-appellant in the courts below.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 271 F. 2d 333. It is reprinted in the joint appendix filed by petitioner Caudle and petitioner Connelly, App. 92-98.*

The opinion and order of the District Court are unreported, but are reprinted in the joint appendix, App. 76-91.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1959. App. 9. A petition for rehearing filed by petitioner Caudle was denied on December 14, 1959. App. 100-101. On December 29, 1959, Mr. Justice Black signed an order extending the time for filing this petition for a writ of certiorari to and including February 12, 1960. App. 101. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, a motion for a new trial on grounds of newly discovered evidence having been filed under Rule 33 of the Federal Rules of Criminal Procedure, it is proper to test the new evidence, found otherwise to be competent, relevant and admissible, by the requirement that the evidence be such as "would probably produce an acquittal" on a new trial.

2. Whether a court abuses its discretion and invades the exclusive domain of the jury by violently attacking the credibility of the witness whose testimony con-

* References to the joint appendix filed herewith by the two petitioners are designated by "App." The symbol "Tr." refers to the original trial transcript, which is also on file with the Clerk of this Court.

stitutes the newly discovered evidence on a new trial motion where (1) the evidence is otherwise found to be relevant, admissible and competent, (2) the witness has been charged with but not found guilty of crime, and (3) the judge has not seen the witness or presided at the original trial.

RULE INVOLVED

Rule 33, Federal Rules of Criminal Procedure:

> The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT OF THE CASE

Petitioner, having been convicted in 1956 of a conspiracy in violation of 18 U.S.C. § 371, filed a motion for a new trial on grounds of newly discovered evidence. That motion was denied and the action was affirmed on appeal. 271 F. 2d 333; App. 92. The instant petition is directed at the reliance on improper criteria and the gross abuse of discretionary power in the ruling on the motion. The denial of a similar motion by petitioner's co-defendant, Matthew J. Connelly, has given rise to a separate petition for certorari, filed by him simultaneously herewith.

These two petitioners were indicted for a conspiracy to defraud the United States of the proper administration of the internal revenue laws and of the proper and faithful service of these petitioners, all in violation of 18 U.S.C. § 371. Also indicted as a member of this conspiracy was Harry I. Schwimmer, a Kansas City attorney. The indictment alleged that the purpose of this conspiracy was to protect one of Schwimmer's clients, Irving Sachs, from indictment, prosecution and imprisonment for income tax fraud. And to achieve that purpose, said the indictment, Schwimmer promised and gave things of value to the two petitioners, who in turn corruptly influenced other government officials to drop the prosecution of Sachs.

Petitioners' convictions pursuant to this indictment were affirmed on appeal. See *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 8); certiorari denied, 356 U.S. 921; rehearing denied, 356 U.S. 964. To the extent pertinent to the new trial motion filed by petitioner herein, the proceedings at the trial may be summarized as follows:

(1) About two weeks after the commencement of the trial, the defendant Schwimmer suffered a heart attack. A mistrial was declared as to him. Tr. 1486, 1535. He was removed from the case as a defendant and he never appeared as a witness. But a substantial body of evidence had already been introduced as to Schwimmer alone, including admissions of guilt. Petitioners objected that this evidence, despite its limitation as to Schwimmer, was so prejudicial to them that it could not be eradicated from the jury's mind, and that petitioners had been deprived of their right to cross-examine Schwimmer. Tr. 1535-47. But the motion for a mistrial as to petitioners was denied.

(2) The Government's case against the petitioners concededly "did not rest on the issue of the credibility of its witnesses but on the issue whether the inferences on which it relied to prove its case could validly be drawn from that uncontroverted body of proof."[1] This body of proof, in relation to Caudle, concerned two major categories of fact: (a) Caudle's determination, in the exercise of his duties as a government official, not to prosecute Sachs; and (b) Schwimmer's contacts with Caudle, particularly with reference to an oil royalty purchased by Schwimmer in Caudle's name.

(3) As to Caudle's action in deciding not to prosecute Sachs, the evidence showed that this determination was made in the normal course of Caudle's duties. The Bureau of Internal Revenue had recommended to the Justice Department that the case be prosecuted. It then became Caudle's duty[2] as Assistant Attorney General in charge of the Tax Division of the Justice Department, to determine whether Sachs' health was so precarious, as claimed, as to warrant foregoing the prosecution of a clear tax fraud. Sachs' case was but one of many whose prosecution depended upon medical factors.

Caudle was confronted with overwhelming medical prognoses that the grand mal epilepsy suffered by

---

[1] Brief for the United States in opposition to petitions for certiorari to review the judgments of conviction, Nos. 738 and 739, Oct. Term, 1957, p. 40.

[2] This duty arose by virtue of the statutory provision, 26 U.S.C.A. § 7122, that "the Attorney General of his delegate may compromise any such [civil or criminal] case [arising under the internal revenue laws] after reference to the Department of Justice for prosecution or defense." A similar provision appeared in § 3761 of the 1939 Internal Revenue Code.

Sachs might prove fatal if the prosecution were forthcoming.[3] The two supervisory assistants whose duty was to sift the facts and make recommendations to Caudle both advised against prosecution, thereby overruling a contrary recommendation by a subordinate. Caudle claimed that his decision not to prosecute was motivated solely by those medical considerations as reflected in the reports of his assistants. But the Government charged that the determination was—by inference—a result of the influences brought to bear by Schwimmer.

(4) Schwimmer's contacts with Caudle were highlighted by the fact that in July, 1950, Schwimmer purchased through one Chris L. Rhodes an oil royalty in the name of Caudle and his wife. The Government asserted that Caudle was a participant in the negotiations for the royalty, accepted it gladly and was anxious to receive the first check. Such inferences rested on certain unsworn letters from Schwimmer to Rhodes which referred to "the other person interested" and to "receiving the go-ahead", though the person thus referred to remained unnamed in the letters.

Caudle testified, however, that when he first learned that the royalty had been purchased in his name he bitterly reprimanded Schwimmer on the telephone and

---

[3] The prediction that Sachs might die if prosecuted was first made by three of his family physicians. That prediction was later supported by two disinterested physicians and by the evaluation of a group of Government doctors headed by the acting Superintendent of St. Elizabeth's Hospital in Washington, D. C. Only Dr. Robert M. Bell, a Government doctor, disagreed on the likelihood of a fatal outcome. All of the other doctors testified at the trial and reconfirmed their prognoses as of the time first given. But Dr. Bell was never called as a witness and was never cross-examined as to his opinion.

insisted that a retransfer be made immediately. Caudle kept insisting that the retransfer be made, but Schwimmer kept procrastinating on grounds of his health. A total of eight royalty checks were issued in Caudle's name before the property was finally retransferred to the Schwimmers in April, 1951. But the evidence was clear that Caudle never received a cent from any of those checks, that all the money went to Schwimmer and that Caudle's name was forged on four of the eight checks.

(5) The second cornerstone of the Government's assertions as to the relationship between Schwimmer and Connelly was Exhibit 100-J, consisting of an unsworn entry appearing in a book entitled "Journal" and kept in Schwimmer's handwriting:

Oct. ... 49	
Shu Stiles [Sachs' firm]	$10,000
Pd out Oil Royalty M.C.	4,200
held in Escrow to be paid out depending on whether I. Sachs case is dropped.	$ 5,800

Petitioners objected to the introduction of this exhibit, particularly since they were deprived by the mistrial of the right to cross-examine Schwimmer as to the exhibit's meaning. Five times the trial judge sustained these objections, emphasizing that the exhibit was ambiguous on its face and did not state to whom the $5,800 balance was to be paid if the case were dropped. The Government contended that it was to be paid to petitioners, Caudle and Connelly. Finally, on the Government's sixth attempt, the trial judge reluctantly admitted this "very poisonous piece of evi-

dence" with an indication that he would reconsider the matter in the event of a conviction. Tr. 1168-1173, 1223-6, 1241, 1368.

(6) At the close of the trial, the trial judge—Judge Hulen—withdrew from the jury's consideration the portions of the indictment regarding the offenses of bribery, perjury and knowingly making false statements and entries. Tr. 3130. After the jury returned a verdict of guilty on the remaining charge of conspiracy under 28 U.S.C. § 371, petitioners moved for judgments of acquittal or for a new trial. But Judge Hulen committed suicide before these motions could be heard. Judge Nordbye was appointed as a Successor Judge under Rule 25, F.R.Cr.P., Tr. 487, Vol. I, and, after a hearing, denied all motions. Sentence was then imposed and appeal proceedings followed. At no time has Judge Nordbye ever seen, heard or observed Schwimmer or any of the witnesses at the trial.

In the meantime, after the trial, Schwimmer suffered a very severe stroke, resulting in the loss of the powers of speech, reading and writing. He also suffered a partial paralysis of his right side. But he then began a period of slow recovery. By the summer of 1958 he once again could speak, though with difficulty. Eventually, in June, 1958, petitioners' attorneys were able to interrogate him under oath and procure sworn statements from him. A motion for a new trial on the basis of this newly discovered evidence was then filed. Schwimmer's sworn statements were then augmented by a deposition ad perpetuandum taken on written interrogatories pursuant to orders of Judge Nordbye. Both the sworn statements, App. 1-22, and the written interrogatories and answers, App. 22-73, are reprinted

in full in the joint appendix hereto. A comparative analysis of Schwimmer's testimony includes the following:

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
1. The Government asserted that Caudle knew of and approved of the royalty purchase. Caudle flatly denied such knowledge or approval.	1. Schwimmer did not tell or otherwise inform Caudle of the negotiation of the purchase. Caudle did not authorize such negotiation. App. 33.
2. The Government asserted that Caudle was greatly interested in the royalty payments and was "the other person interested" referred to in Schwimmer's correspondence with Rhodes. Caudle denied any such implication.	2. Schwimmer stated Caudle "was never interested in these oil royalties." App. 63. Caudle did not know of the dealings with Rhodes. App. 18. Schwimmer does not now know the identity of "the other person interested" referred to in the letter to Rhodes. App. 65.
3. Caudle testified that when he first learned of the royalty purchase he became angry with Schwimmer and insisted that it be taken out of his name.	3. Schwimmer testified that on Caudle's receipt of the information "he let me have it. He was angry with me." App. 18. Caudle "said I shouldn't have done it" and requested that all necessary steps be taken immediately to transfer it out of his name. App. 18-19, 33.
4. Caudle testified that he kept insisting that the oil royalty be retransferred.	4. Schwimmer stated that on various dates "he told me to get it out of his name and back into mine . . . he did not want to take it and keep it." App. 34.
5. Caudle testified that the delay in the retransfer was due to Schwimmer's procrastination on grounds of ill health.	5. Schwimmer stated that he delayed the retransfer "because of my illness, and because of various things or other" beyond his control. App. 19, 34.

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
6. A letter from Schwimmer to Rhodes in September, 1950, stated that Caudle "has already asked about" a royalty payment. Caudle denied making such an inquiry.	6. Schwimmer stated "Caudle had nothing to do with that royalty." He denied the truth of the statement in the letter to Rhodes. App. 67-68.
7. Caudle testified that he never received or kept any of the oil royalty payments.	7. Schwimmer stated Caudle never received any of these payments. App. 19-20, 35. Any money paid to Caudle on his endorsement was turned over "to me." App. 62. All the proceeds went to Schwimmer. App. 62.
8. Caudle testified that he did not endorse four of the eight royalty checks.	8. Schwimmer admitted that he or his secretary endorsed these checks by forging Caudle's signature. App. 62. Schwimmer received all the proceeds of the checks. App. 62. He further admitted he was not Caudle's agent in handling these checks. App. 69.
9. The Government asserted that Caudle was impliedly referred to in Exhibit 100-J and received some of the alleged pay-off money, Caudle steadfastly denied this.	9. Schwimmer testified that Exhibit 100-J was solely a record for his income tax purposes. App. 28-29, 54. Caudle never received any part of the $10,000 mentioned in this exhibit. App. 21, 35, 51. Nor did Caudle receive any part of the $5,800 held in escrow. Schwimmer himself received the $5,800. App. 29, 35. [Judge Nordbye found that "the entire $10,000 went to Connelly and Schwimmer." App. 83].

The assertions and facts developed at the trial	*Schwimmer's statements in reference thereto*
10. The Government asserted that a $3,600 item in Exhibit 100-P, a journal entry entitled "Reimbursement of Money Advanced Shu Stiles," related to the purchase of Caudle's oil royalty.	10. Schwimmer testified this item "had nothing to do with Caudle's oil royalty at all." App. 66.
11. The Government asserted that Schwimmer impliedly or expressly promised Caudle a reward as a consideration for a favorable determination as to the prosecution of Sachs for tax fraud.	11. Schwimmer flatly denied that there ever was such a promise. He stated Caudle never received anything whatsoever of value from Schwimmer or Sachs and there never was any kind of agreement or understanding relative to a favorable decision in the Sachs matter. App. 20, 35.

Schwimmer's statement and deposition were accompanied by affidavits and testimony of doctors, attorneys, a psychiatrist and a speech therapist attesting to Schwimmer's mental competence and memory at the time of his testimony. The Government, which had participated in the deposition by submitting 207 interrogatories, countered with a report from a neurologist and an affidavit of an internal revenue agent to the effect that Schwimmer did not have the physical or mental capacity to answer questions about events prior to his stroke.

Judge Nordbye, after hearing, denied petitioners' motions for a new trial. App. 91. In so doing he found that:

1. Schwimmer's testimony was newly discovered in the sense that, because of Schwimmer's bad health and the mistrial as to him, the petitioners had never before

had an opportunity to avail themselves of this testimony. App. 79.

2. Petitioners acted with due diligence in bringing this evidence to the Court's attention. App. 79.

3. The evidence was not only newly discovered "but is relevant" and "is not entirely cumulative, although in many respects it only tends to corroborate the evidence that defendants had offered heretofore in their behalf at the trial." App. 80.

4. Despite Schwimmer's physical condition and the "decided infirmities in his memory," it was the Court's considered view in light of the medical testimony that Schwimmer was competent to testify. App. 80-81.

5. ". . . in the event a new trial were granted, Schwimmer's deposition should be received and considered by a jury." Schwimmer "is a competent witness" and "the weight and credibility of his testimony is for the jury." App. 81.

6. "Whether, if sitting as a trier of the facts, I would probably acquit or convict the defendants in view of the additional proffered evidence by way of Schwimmer's deposition, is not determinative of the question." App. 89-90.

7. The decisive question, according to Judge Nordbye, was "whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted." App. 81. The Court answered that question in the negative. Without ever having seen Schwimmer or any witness at the trial, Judge Nordbye ruled that the proffered evidence was incredible. "It seems inconceivable," said the Court, "that

the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury." App. 91.

The Court of Appeals affirmed the denial of the motion, emphasizing anew the requirement that the newly discovered evidence, to justify a new trial, "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." 271 F. 2d 333 at 335; App. 96.

REASONS FOR GRANTING THE WRIT

The decision below necessarily presents an important question in the administration of criminal justice in the federal courts. That question is whether a new trial motion grounded on newly discovered evidence may properly be tested, under Rule 33 of the Federal Rules of Criminal Procedure, by the requirement that the new evidence be such as that, on a new trial, it would probably produce an acquittal.

Such a standard is in direct conflict with the principles expressed by this Court in *Griffin* v. *United States*, 336 U.S. 704. Indeed, the standard itself is inherently unworkable, creates an unfair burden of proof on the defendant and invades the function of the jury. Gross inconsistencies and uncertainties have marked the formulation and application of the standard in the lower federal courts. All these factors combine to make appropriate the exercise of this Court's certiorari jurisdiction to review this constantly recurring problem and to give authoritative guidance to the lower federal courts.

1. The direct conflict with the Griffin case

An oft-repeated statement in the lower federal courts, and one that has been reiterated and applied in this case, is that a new trial on grounds of newly discovered evidence may be had only if, among other things, the evidence is "such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8).[4] This is the requirement that has been found wanting in this case and has resulted in the denial of the motion for a new trial.

This requirement as to a showing of the probability of acquittal has never been sanctioned or approved by this Court.[5] In *United States* v. *Johnson*, 327 U.S. 106, 111; note 5, with express reference to the aforementioned statement of criteria as expressed in the lower federal courts, the Court stated that in the context of that case it "need not consider what criteria should have guided the court in passing on the [new

[4] The other four criteria set forth in the *Johnson* case, and repeated below, are to the effect that (1) the evidence must be in fact newly discovered, (2) the movant must be diligent in uncovering the new facts, (3) the evidence must not be merely cumulative or impeaching, and (4) the evidence must be material to the issues involved. See App. 96.

[5] In *Williams* v. *United States*, 137 U.S. 113, 137, involving a claim for military pay in a Court of Claims suit, this Court said in passing that with respect to the papers constituting newly discovered evidence in the matter "the Court of Claims says that it is 'of the opinion that if they had been put in evidence on the trial they would not have changed the result.' We concur in this view, after having examined the papers." This statement, sometimes cited as authority for the requirement in question, was not made in the context of a criminal proceeding; nor was it anything more than an *ad hoc* approval of a lower court finding without reference to any general standard for new trial motions.

trial] motion." A similar reservation as to these criteria is found in *Mesarosh* v. *United States*, 352 U.S. 1, 9.

But the decision in *Griffin* v. *United States*, 336 U.S. 704, 708-709, without specific reference to the standards established by the lower courts, created a criterion for testing a new trial motion which is totally inconsistent with any requirement that the newly discovered evidence "probably produce an acquittal." This *Griffin* criterion is expressed in the words of the Court remanding the case to the Court of Appeals for the District of Columbia to consider (336 U.S. at 709):

> ". . . whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."[6]

The criterion as thus formulated was created by this Court in direct response to the issue in that case as to what standard should guide a court in evaluating the newly discovered evidence as a basis for a new trial. In that respect the brief of the United States had expressly called the Court's attention to the prevailing lower court rule that the evidence must be such as would probably produce an acquittal or a different verdict.[7] But that brief, signed by the Solicitor Gen-

[6] On the ensuing remand, the Court of Appeals said: "We think it would be too dogmatic. . . The appellant is therefore entitled to a new trial." *Griffin* v. *United States*, 183 F. 2d 990, 992 (App. D.C.). A new trial never occurred; however, since the defendant pleaded guilty to the offense of second degree murder and was sentenced to a prison term of 5 to 21 years. Crim. No. 246-47 (D.C.D.C.).

[7] Brief for the United States, *Griffin* v. *United States*, 336 U.S. 704, No. 417, Oct. Term, 1948, p. 20.

eral, did more than refer to the rule; it urged a substantial modification thereof in the following terminology:[8]

> "However, where the offense in question is of a serious type, and particularly in a capital case, we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a *reasonable possibility* that its consideration by a jury at a new trial would result in the return of a different verdict." [Emphasis in original.]

Significance must therefore be attached to the fact that the Court in *Griffin* neither adopted the lower court rule as to the probability of acquittal nor accepted the Solicitor General's modification thereof in terms of reasonable possibilities. Instead the emphasis was placed on the reasonableness of the conclusion as to whether the jury would "have attached significance to the evidence favorable to the defendant." And that formula was enunciated without limitation as to the nature or the seriousness of the crime involved.

The *Griffin* formula must therefore be regarded as a flat rejection of the rule on the probability of acquittal. The latter rule, as the Solicitor General conceded in the *Griffin* case, places "too heavy a burden on the defendant."[9] It forces him to demonstrate that he is

[8] *Ibid.*, pp. 20-21.

[9] As Judge Jerome Frank said in relation to a requirement that there be affirmative "evidence of defendant's innocence": "Not only is such a doctrine most unjust and (I think) unreasonable, but it comes perilously close to putting on the defendant the burden of proving his innocence: Having once been convicted,

probably innocent and to prove, without the benefits of a jury trial, that a jury would probably acquit him. In effect the lower court rule limits new trials to those innocent persons who can prove that they have been unjustly convicted. But Rule 33 of the Federal Rules of Criminal Procedure permits new trials whenever "required in the interest of justice." Obviously the interests of justice may require or justify a new trial even where probable acquittal has not been established.

The *Griffin* case, moreover, involved new evidence in the nature of an uncommunicated threat to the defendant, merely tending to lend credence to his claim of self defense. In the instant case, however, the new evidence "cuts to the very heart of the testimony" adduced at the trial, cf. *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 242, and directly affects the implications of guilt upon which the jury verdict rested.[10] There would seem to be more reason to expect a jury to attach significance to such directly pertinent evidence than to the indirect evidence of the *Griffin* variety. Hence the *Griffin* criterion is all the more pertinent here.

This clear conflict between the lower federal court rule and the *Griffin* rule is a matter of obvious importance and makes appropriate the exercise of the Court's

---

unfairly as it now appears from the new evidence, he can procure a fair re-trial only by offering affirmative evidence to prove his innocence—although a basic principle of democratic justice requires the government to prove guilt in order to obtain a valid conviction." *United States* v. *On Lee*, 201 F. 2d 722, 726 (dissenting opinion).

[10] To use the words of Mr. Justice Douglas, sitting as Circuit Justice in *Wolcher* v. *United States*, 76 S. Ct. 254, 255, 100 L. Ed. 1521, 1523, the new evidence here "might well tip the scales in defendant's favor, as it goes to the heart of the case."

certiorari jurisdiction in this case. The question plainly affects not only the evaluation of the newly discovered evidence in the instant case but the standard to be applied to all motions for a new trial under Rule 33 grounded on newly discovered evidence.

2. The conflicts involved in the "probable acquittal" rule.

The "probable acquittal" rule of the lower federal courts not only conflicts with the *Griffin* criterion but the rule itself abounds with conflicting formulations and meanings. The rule has become chameleonic and inconstant, devoid of any definitive content. Such a rule, if it is to stand as a meaningful guide for testing new trial motions, needs and deserves a most thorough and authoritative examination. Only this Court can determine if the rule is valid. And, if the rule be proper, only this Court can give it the meaning necessary to insure a uniform application in all federal courts.

At least four different versions of the rule in question are extant:

(a) *The "probable acquittal" version.* The most frequent verbalization of the rule in the federal courts is that the newly discovered evidence must be such as "would probably produce an acquittal." Such was the formulation in the court below.[11] This version of the rule is generally credited to the opinion in *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8), which cites as authority "12 Cyc. 734, and cases cited." That

[11] See also *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8); *Evans* v. *United States*, 122 F. 2d 461, 469 (C.A. 10); *Wolcher* v. *United States*, 233 F. 2d 748, 751 (C.A. 9); *United States* v. *On Lee*, 201 F. 2d 722, 724 (C.A. 2); *United States* v. *Rutkin*, 208 F. 2d 647, 649 (C.A. 3).

authority, however, consists of a rather general and confused synthesis of state court decisions, some of which support the "probable acquittal" language and others of which merely say that the new evidence need only justify a jury in returning a verdict other than that returned.[12] The latter line of cases would seem to indicate a standard of proof much less stringent than proving one's probable innocence.

(b) *The "different verdict" version.* Still another source of the rule is said to be the early Georgia decision in *Berry* v. *State*, 10 Ga. 511, 527, mentioned by this Court in *United States* v. *Johnson*, 327 U.S. 106, 111, note 4. The *Berry* case, however, casts the rule in terms of the new evidence being "so material that it would probably produce a different verdict, if a new trial were granted."

The *Berry* case in turn relied upon very early state court opinions. One of them, *Robins* v. *Fowler*, 2 Ark. 133, 144, does not even mention a requirement of probably producing a different verdict but refers primarily to the need for materiality. Others speak not in terms of producing an "acquittal" but of producing "a different verdict" which would "be almost, if not quite, equivalent to a verdict of acquittal."[13]

Perhaps the formulation of the rule in the *Berry* case has led some federal courts to drop the reference

[12] See *State* v. *Hendrix*, 45 La. Ann. 500, 501; *Rainey* v. *State*, 53 Ind. 278, 279; *Sahlinger* v. *People*, 102 Ill. 241, 248; *State* v. *Diskin*, 35 La. Ann. 46, 48; *Baker* v. *State*, 111 Ga. 141, 143.

[13] See *Commonwealth* v. *Flanagan*, 7 Watts & Serg. 415, 423; *Moore* v. *Philadelphia Bank*, 5 Serg. & Rawles 41, 42; *Commonwealth* v. *Williams*, 2 Ashmead 69, 76; *Lessee of Ludlow's Heirs* v. *Park*, 4 Hamm. (Ohio Rep.) 5, 44-45.

to "acquittal" and refer only to the probability of a "different verdict" resulting on the new trial.[14] That distinction can have significant meaning in terms of the movant's burden of proof since a different verdict, other than that of acquittal, can result where the offense involved has different degrees of culpability, or where at least one juror is impressed by the new evidence and the verdict is that of a hung jury.

(c) *The "'materiality" version.* The *Berry* case further suggests that the requirement of probability of a different verdict may well be only an elaboration of the concept of materiality of the new evidence. The *Berry* criterion states that the evidence must be "*so material* that it would probably produce a different verdict." If, then, the defendant can prove that the evidence is highly significant and material to the case, thereby justifying a verdict of not guilty, has he not demonstrated for purposes of this rule that a different verdict probably would result?[15]

If materiality is the key to the probability of a different result, have not the lower federal courts, including the court below, improperly separated the concept of materiality or relevancy from the probability of an acquittal or a different verdict? And has

[14] See, e.g., *Heald* v. *United States*, 175 F. 2d 878, 883 (C.A. 10); *Nilva* v. *United States*, 212 F. 2d 115, 124 (C.A. 8); *Apel* v. *United States*, 247 F. 2d 277, 285 (C.A. 8). In its brief to this Court in *Griffin* v. *United States*, 336 U.S. 704, No. 417, Oct. Term, 1948, p. 20, the United States summarized the rule in terms of evidence which "would probably result in a different verdict." No mention was made of the necessity of a probable acquittal.

[15] See *Commonwealth* v. *Williams*, 2 Ashmead 69, 81 ("so material, as that it would probably produce a different result"); *Rainey* v. *State*, 53 Ind. 278, 279 ("not so material that it would, with any certainty, produce or justify any different result").

not the petitioner herein, having demonstrated to the satisfaction of the District Court that the new evidence "is relevant . . . not entirely cumulative . . . should be received and considered by a jury" (App. 80-81), sustained his burden of proof?

(d) *The "might reach a different conclusion" version.* Still another version of the rule is to be found in the so-called recantation cases, where a Government witness recants after trial. Here the federal courts generally abandon the "probable acquittal" formulation and insist that the defendant merely show that without the recanted or false testimony the jury "might" have reached a different conclusion.[16] But at least one federal court, in stating the test to be whether the new evidence "would in reasonable likelihood have given rise at the trial to a different result," has applied essentially this version in a non-recantation case. *Apel* v. *United States*, 247 F. 2d 277, 285 (C.A. 8). And this is basically the version which the United States urged upon this Court in *Griffin* v. *United States*, 336 U.S. 704,[17] suggesting that the new evidence need only be such that there is a "reasonable pos-

---

[16] *Larrison* v. *United States*, 24 F. 2d 82, 88 (C.A. 7); *United States* v. *Marachowsky*, 213 F. 2d 235, 238 (C.A. 7); *Gordon* v. *United States*, 178 F. 2d 896, 900 (C.A. 6); *Winer* v. *United States*, 228 F. 2d 944, 952 (C.A. 6). This line of cases, applying a different standard in terms of the possibility of a different result, has been noted by this Court without comment in *United States* v. *Johnson*, 327 U.S. 106, 111, note 5, and *Mesarosh* v. *United States*, 352 U.S. 1, 12, note 6. This different rule in recantation cases, however, has been termed "questionable since it was without authority." Note, 39 Minn. L. Rev. 316, 317 (1955). See, in general, Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 324-327 (1957).

[17] Brief for the United States, No. 417, Oct. Term, 1948, p. 21.

sibility" of a different verdict. The *Griffin* case, of course, did not involve recantation.

By what standard should petitioner's new evidence—or that of any person seeking a new trial—be judged? By the probability of acquittal? By the probability of a different verdict? By the materiality of the evidence? By the reasonable possibility of a different verdict? By the possibility that the jury "might" reach a different conclusion? Or, in the words of the *Griffin* ruling, by the possibility that the jury would attach "significance to the evidence favorable to the defendant"?

An affirmative answer to any one of the foregoing standards can be found in terms of precedent. Only this Court can determine which of the standards is the proper one. Only this Court can remove the inconsistencies and conflicting formulations that have encrusted themselves on the standard which the court below sought to apply. And if the findings of the District Courts on new trial motions are to have the non-reviewable status accorded them by this Court in *United States* v. *Johnson*, 327 U.S. 106, 111, and in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, a uniform and meaningful standard in this context must be established to give defendants fair notice as to their burden of proof and to guide the courts in resolving such motions.

3. The District Court's abuse of discretion.

Even assuming that it was proper to evaluate petitioner's newly discovered evidence by the probability of acquittal, the District Court's application of that standard to the facts of this case reveals a gross abuse of discretion justifying further review by this Court.

That abuse consists of a credibility evaluation exceeding the power of the court and invading the exclusive function of a jury.

(a) *The abusive condemnation of the new evidence.* The District Court, which was affirmed *in toto* by the Court of Appeals, held that the new evidence is indeed newly discovered, that the petitioners used due diligence in bringing it before the court, that the evidence is relevant and material to the issues, that the witness is competent and that the evidence would be admissible in a new trial if such were granted. App. 80-81. Moreover, on two occasions the District Court opinion observes that "the weight and credibility of his [Schwimmer's] testimony is for the jury" (App. 81) and that "To predict what a jury would do in appraising Schwimmer's testimony is of course something the Court cannot determine with any mathematical certainty" (App. 89).

That Schwimmer's testimony was relevant and material is beyond doubt. The conviction necessarily rested on the unsworn letters, entries and statements of Schwimmer, from which the critical inferences were drawn. But through a fortuitous circumstance beyond anyone's control—the illness of Schwimmer—Schwimmer's testimony never got to the jury so as to explain the written documents and to negate the resulting inferences. Thus the most crucial evidence in petitioner's behalf was absent at the trial.

And because it was so evident at the time that only Schwimmer could testify as to these crucial factors, a timely motion for a continuance or a mistrial was made by petitioner. The denial of that motion was affirmed, however, on the speculative assumptions that had Schwimmer been able to testify he might have

claimed the Fifth Amendment or his testimony might have had no tendency to exonerate petitioner. See *Connelly* v. *United States*, 249 F. 2d 576, 582-583 (C.A. 8). **Those assumptions have now been proved false.** Schwimmer is able to testify and he has been found competent as a witness. He has claimed no privilege and his testimony, which has been found admissible, has a strong tendency to exonerate both petitioners. His testimony explains what was left unexplained at the trial. It directly refutes the criminal inferences which had been critical to the conviction. His testimony, in brief, supplies certain vital elements of fact which might well have produced a verdict of acquittal for the petitioner.[18]

Yet petitioner has been denied a new trial because of the District Court's unprecedented and abusive condemnation of Schwimmer's credibility as a witness. He has been condemned as "an admitted perjurer", a person still under indictment, a "fixer", the "arch conspirator" and a "discredited witness". App. 81, 90. His motives "were venal and corrupt." App. 90. Hence, the District Court concluded, it was "simply incredible" and "seems inconceivable" that Schwimmer's testimony—in every other respect material and relevant and competent—could possibly have "the weight and effect of producing an acquittal." App. 90-91.

[18] See *Amos* v. *United States*, 218 F. 2d 44 (App. D.C.), where the court ruled: "We think a new trial should have been granted. We have held that newly discovered evidence which is merely cumulative does not require a new trial. *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F. 2d 652. But that principle should not be applied where, as here, a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself."

The District Court's opinion on its face is contradictory; it violates its own wise precept that the weight and credibility of Schwimmer's testimony are for the jury. App. 81. More importantly, to the extent that credibility may properly be considered by the court in ruling on a new trial motion, such an evaluation of Schwimmer as a witness, such a bitter analysis of his motives and his character, far exceeds legitimate bounds. This judicial analysis is flatly contrary to the established principle that a defendant charged with criminal activity and perjury—which is the most that can be said from the record as to Schwimmer—"is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." *Allison* v. *United States*, 160 U.S. 203, 210. See also *Hicks* v. *United States*, 150 U.S. 442, 452; *Quercia* v. *United States*, 289 U.S. 466, 470.[19] A man under indictment may testify falsely or truthfully; or he may testify truthfully only as to certain facts. But he is not to be wholly and unmitigatingly condemned, particularly when the liberty of others is at stake. As this Court said in *Reagan* v. *United States*, 157 U.S. 301, 305: "It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false."

[19] "Much evidence in the way of affidavits was introduced by both sides touching the character of the affiants . . . and we might say that it was about equal in volume and weight, but whether their testimony is or not credible will be a question for the jury upon another trial, and not one for us to determine at this time." *Johnson* v. *Commonwealth*, 188 Ky. 391, 399.

One cannot definitely say, from a mere examination of the cold record as indulged in by the courts below, what portions of Schwimmer's testimony might be believed or disbelieved by a jury in light of the attacks which would undoubtedly be made on his character and credibility by the prosecution. A jury conceivably could believe all that he said in exoneration of Caudle and Connelly while finding him otherwise a perjurer or unworthy of belief. It could give great weight to the fact that his new testimony for the most part is against his own interest and that the consistency with petitioners' testimony gives the ring of truth to Schwimmer's story in that respect. And all that might happen even though Schwimmer be thought to be a "fixer", "the arch conspirator", "an admitted perjurer" and a "discredited witness". App. 90, 97. But the important point is, in Judge Learned Hand's words, that the judge's function is not to establish "any quantitative standards of verity;" our jurisprudence, while recognizing the right of the prosecution and the defense to attack the credibility of any witness, has "unconditionally left it to the jury to determine how persuasive the testimony of any witness shall be." *United States* v. *Reina*, 242 F. 2d 302, 307 (C.A. 2).[7]

What the District Court here did was to engage in a particularly abusive type of dogmatic speculation as to the effect of the new evidence, a dogmatic speculation which this Court condemned in *Griffin* v. *United States*, 336 U.S. 704, 709. The court made up its own mind as to the credibility of Schwimmer and then

[7] As Mr. Justice Story said for the Court in *United States* v. *Marchant*, 12 Pet. 41 U.S. 480, 483, "although a competent witness, the credibility of his testimony is a matter for the consideration of the jury, under all the weight of circumstances connected with the case, and his interest in the result."

arbitrarily and dogmatically assumed that any jury would necessarily adopt the same viewpoint and disregard completely any portions of his testimony favorable to petitioners. The court tried to judge not the weight and probable effect of the new evidence if believed by the jury but rather the likelihood of a jury believing the testimony of one whom the judge found to be a thorough scoundrel and liar. The entire emphasis was placed on the witness himself, not the new evidence which he could give and which was admittedly relevant, material and admissible. In thus relegating unto itself an inherent function of the jury, the District Court disregarded this Court's admonition that "it cannot be determined conclusively by any court that . . . [the] testimony was insignificant in the general case against the defendants" and that "Only the jury can determine what it would do on a different body of evidence." *Mesarosh* v. *United States*, 352 U.S. 1, 12.

These considerations all add up to a plain abuse of discretion justifying review under the principles set forth in *United States* v. *Johnson*, 327 U.S. 106, 111. And in the exercise of this Court's supervisory jurisdiction over the administration of criminal justice in the federal courts, the determination below should be reversed and a new trial granted on the basis of newly discovered evidence already found to be relevant, material and admissible.

(b) *The weight to be accorded the views of the successor judge.* Judge Nordbye, as a successor judge, did not preside at the trial of the petitioners. That trial covered thirty-eight days and involved sixty-six witnesses; more than one thousand pages of exhibits were introduced. Judge Nordbye saw and observed none of those witnesses; he saw none of the reactions of the

jury; he felt none of the impact of the exhibits as they were introduced; and the entire atmosphere of the courtroom as the trial progressed was lost upon him. More particularly, he has never seen either of the petitioners or Schwimmer. To him, Schwimmer—whom he so thoroughly analyzed and roundly condemned—is nothing more than a name.

Thus Judge Nordbye's views and opinions as to the newly discovered evidence are completely stripped of the weight and value they might otherwise have had he presided at the trial and observed the witnesses. The findings made as to Schwimmer's credibility and as to the probable effect of his testimony do not come from a judge who has watched the case unfold from day to day and thus is "exceptionally qualified" to pass judgment on that new evidence. See *United States* v. *Johnson*, 327 U.S. 106, 112. Lacking the "feel of the case" which this Court deemed so important in *Conn* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, Judge Nordbye was no "better able to estimate the value," *Moore* v. *United States*, 150 U.S. 57, 60, of the old and the new testimony than any appellate judge viewing the cold printed record. See also *Wolcher* v. *United States*, 233 F. 2d 748, 751 (C.A. 9). He had no perspective, no superior position, no vantage point and no experience with the case which might lend special cogency to his views.

This fact serves to underscore the abuse involved in the extreme and total condemnation of Schwimmer's credibility and in the resulting arbitrary conclusion that an acquittal of petitioner was not probable. Drained of the special competence which only a presiding judge can impart, Judge Nordbye's findings and conclusions, for the reasons heretofore expressed, are plainly reviewable and reversible.

CONCLUSION

This case presents an egregious example of the type of abuse that arises when a District Court tries to apply a broad and uncertain doctrine as to the probability of acquittal in passing on a new trial motion. The need for correcting the grave abuse of discretion and the miscarriage of justice in this case is a compelling one. But above all, the need for defining the proper standard as to the effect of the newly discovered evidence is an urgent one from the standpoint of a fair and uniform administration of criminal justice in the federal courts. Once that standard is definitively formulated in light of the controlling decision of this Court in *Griffin* v. *United States*, 336 U.S. 704, 709, the new evidence in this case can be tested pursuant thereto and justice accorded to this petitioner. And all others who seek new trials in federal courts will know by what standard their newly discovered evidence will be judged in relation to the possible or probable impact on a new trial.

To those ends, therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. HOOKER
1106 Nashville Trust Bldg.
Nashville 3, Tennessee

EUGENE GRISSMAN
1701 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:

T. A. CAUDLE, JR.
Hilton Head Island, S. C.

C. ARTHUR ANDERSON
722 Chestnut Street
St. Louis, Missouri

WALTER M. HAYNES
Winchester, Tennessee

February 12, 1960